BEFORE THE FOREST PRACTICES APPEALS BOARD
STATE OF WASHINGTON

DAVID A. MACBRYER Appellant, v. STATE OF WASHINGTON, DEPARTMENT OF NATURAL RESOURCES Respondent,	FPAB NO. 94-20 FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This matter came on before the Honorable William A Harrison, Administrative Appeals Judge, presiding, and Board Member Robert A. Quoidbach

The matter is an appeal from a $2,000 civil penalty for allegedly conducting forest practices without an approved application.

Appearances were as follows.

1. David A. MacBryer, representing himself.

2 John E Justice, Assistant Attorney General, for the Washington State Department of Natural Resources

The hearing was conducted at the John A.Cherberg Building on September 20, 1994 Gene Barker & Associates, Olympia, provided court reporting services

Witnesses were sworn and testified. Exhibits were examined. From testimony heard and exhibits examined, the Forest Practices Appeals Board makes these

FINDINGS OF FACT

I

This matter arises in Snohomish County. Appellant, David A MacBryer, is an experienced logging operator who was engaged by a landowner, Hadley, to harvest timber

II

After obtaining a forest practices approval from the Department of Natural Resources (DNR), appellant harvested a considerable area within the Hadley ownership. That done, appellant then submitted another application to DNR for a parcel of 7 acres elsewhere on Hadley land. That application shows the 7 acres to be east and up slope from a creek The application also proposed a haul road to cross the creek.

III

The appellant's 7 acre application was classified as Type III (priority) with a notation of unstable soils. In July, 1993, the application was marked "Disapproved" and returned to the appellant. The DNR also placed the following on the disapproved application

> "Disapproved due to incomplete road information. Please supply detailed road location plan with bridge site information."

IV

Appellant did not supply a detailed road location plan with bridge site information. Rather, a meeting was held on the site between the appellant and the DNR forester. This was in September, 1993 After the oral discussion of stream crossing methods which ensued, the

appellant believed that a solution had been reached. The appellant assumed that DNR would issue a forest practices approval based upon that oral conversation The DNR forester assumed that appellant would re-apply for the 7-acre cut, in writing, using concepts agreed to on the ground.

V

Without submitting any further application, the appellant began harvesting in December, 1993. Tree falling in that month was followed by removal of the fallen logs through January, 1994 The area harvested was close to, but different from , the 7 acre area previously disapproved. Essentially, the harvest was west of the creek, partly on Hadley land and partly (in trespass) onto an adjacent ownership. In all, approximately 30 mbf was harvested.

VI

The DNR then cited appellant for harvesting without a forest practices permit, and assessed a civil penalty of $2000 for the events of December, 1993-January, 1994 From this appellant now appeals

VII

Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such.

From these Findings of Fact, the Board issues these·

CONCLUSIONS OF LAW

I

Violation. Since 1975, the Forest Practices Act has provided that.

> "No ... ClassIII .. forest practice shall be commenced or continued ... unless the department [DNR] has .. approved an application ..."
> RCW 76.09 050(2)

The appellant harvested timber in an area of unstable soils and thereby conducted a Class III forest practice.

II

The DNR shall notify the applicant *in writing* of its approval of a forest practices application. RCW 76.09.050 (5). The oral discussion on the ground between the DNR forester and the appellant did not constitute the approval of a forest practices application. The approval of a forest practices application, like the issuance of a hunting or fishing license, is done in writing, not orally.

III

The appellant conducted a Class III forest practice without an approved application in violation of RCW 76.09.050 (2).

IV

Penalty The penalty, as assessed by DNR, is made applicable to events occurring in December, 1993-January, 1994 This is a period of time which straddles the date of

January 1,1994. The significance of this is that on January 1,1994, by amendment of RCW 76.09.170, the Legislature increased civil penalties applicable to forest practices vilolations. The penalty here was assessed under the new schedule while the events in question occurred during the time both before and after the amendment.

V

The applicable rule in this situation has been stated as follows:

> " a staute which creates a new liability or imposes a penalty will not be construed to apply retroactively."

Johnston v. Beneficial Management, 85 Wn.2d 637, 538 P2d 510 (1975). Therefore, some proration must be made between the old and new penalty schedules to avoid retroactive application of the amended statute.

VI

An appropriate proration in this instance would be reached by combing the former base penalty of $500 (for events in December, 1993) and the new base penalty of $2000 (for the events in January, 1994), then dividing by 2 to obtain an average. This yields a penalty of $1250, which we determine to be appropriate in this matter.

VII

Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such,

From the foregoing, the Board issues this·

ORDER

The violation of conducting forest practices without an approved application is affirmed. The civil penalty is abated to $1250

DONE at Lacey, Washington, this 10th day of ~~September,~~ October 1994

William A. Harrison

HONORABLE WILLIAM A HARRISON
Administrative Appeals Judge

FOREST PRACTICES APPEALS BOARD

NORMAN L WINN, Member

DR MARTIN R. KAATZ, Member

ROBERT E QUOIDBACH, Member

F94-20F

BEFORE THE FOREST PRACTICES APPEALS BOARD
STATE OF WASHINGTON

DAVID A. MACBRYER Appellant, v. STATE OF WASHINGTON, DEPARTMENT OF NATURAL RESOURCES Respondent,	FPAB NO 94-20 FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This matter came on before the Honorable William A Harrison, Administrative Appeals Judge, presiding, and Board Member Robert A Quoidbach.

The matter is an appeal from a $2,000 civil penalty for allegedly conducting forest practices without an approved application

Appearances were as follows.

1. David A MacBryer, representing himself

2. John E. Justice, Assistant Attorney General, for the Washington State Department of Natural Resources

The hearing was conducted at the John A Cherberg Building on September 20, 1994 Gene Barker & Associates, Olympia, provided court reporting services

Witnesses were sworn and testified. Exhibits were examined. From testimony heard and exhibits examined, the Forest Practices Appeals Board makes these

FINDINGS OF FACT

I

This matter arises in Snohomish County Appellant, David A MacBryer, is an experienced logging operator who was engaged by a landowner, Hadley, to harvest timber

II

After obtaining a forest practices approval from the Department of Natural Resources (DNR), appellant harvested a considerable area within the Hadley ownership. That done, appellant then submitted another application to DNR for a parcel of 7 acres elsewhere on Hadley land. That application shows the 7 acres to be east and up slope from a creek The application also proposed a haul road to cross the creek

III

The appellant's 7 acre application was classified as Type III (priority) with a notation of unstable soils In July, 1993, the application was marked "Disapproved" and returned to the appellant. The DNR also placed the following on the disapproved application

> "Disapproved due to incomplete road information.
> Please supply detailed road location plan with bridge
> site information."

IV

Appellant did not supply a detailed road location plan with bridge site information Rather, a meeting was held on the site between the appellant and the DNR forester This was in September, 1993. After the oral discussion of stream crossing methods which ensued, the

appellant believed that a solution had been reached. The appellant assumed that DNR would issue a forest practices approval based upon that oral conversation The DNR forester assumed that appellant would re-apply for the 7-acre cut, in writing, using concepts agreed to on the ground.

V

Without submitting any further application, the appellant began harvesting in December, 1993. Tree falling in that month was followed by removal of the fallen logs through January, 1994 The area harvested was close to, but different from , the 7 acre area previously disapproved Essentially, the harvest was west of the creek, partly on Hadley land and partly (in trespass) onto an adjacent ownership In all, approximately 30 mbf was harvested.

VI

The DNR then cited appellant for harvesting without a forest practices permit, and assessed a civil penalty of $2000 for the events of December, 1993-January, 1994 From this appellant now appeals

VII

Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such

From these Findings of Fact, the Board issues these·

CONCLUSIONS OF LAW

I

Violation. Since 1975, the Forest Practices Act has provided that.

> "No . ClassIII forest practice shall be commenced or continued . unless the department [DNR] has approved an application . "
> RCW 76.09 050(2)

The appellant harvested timber in an area of unstable soils and thereby conducted a Class III forest practice.

II

The DNR shall notify the applicant *in writing* of its approval of a forest practices application. RCW 76 09 050 (5) The oral discussion on the ground between the DNR forester and the appellant did not constitute the approval of a forest practices application. The approval of a forest practices application, like the issuance of a hunting or fishing license, is done in writing, not orally

III

The appellant conducted a Class III forest practice without an approved application in violation of RCW 76 09 050 (2)

IV

Penalty The penalty, as assessed by DNR, is made applicable to events occurring in December, 1993-January, 1994 This is a period of time which straddles the date of

January 1,1994. The significance of this is that on January 1,1994, by amendment of RCW 76 09 170, the Legislature increased civil penalties applicable to forest practices violations. The penalty here was assessed under the new schedule while the events in question occurred during the time both before and after the amendment.

V

The applicable rule in this situation has been stated as follows

> " a staute which creates a new liability or imposes a penalty will not be construed to apply retroactively "

Johnston v. Beneficial Management, 85 Wn 2d 637, 538 P2d 510 (1975)

Therefore, some proration must be made between the old and new penalty schedules to avoid retroactive application of the amended statute

VI

An appropriate proration in this instance would be reached by combing the former base penalty of $500 (for events in December, 1993) and the new base penalty of $2000 (for the events in January, 1994), then dividing by 2 to obtain an average This yields a penalty of $1250, which we determine to be appropriate in this matter

VII

Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such.

From the foregoing, the Board issues this

ORDER

The violation of conducting forest practices without an approved application is affirmed. The civil penalty is abated to $1250.

DONE at Lacey, Washington, this 10th day of ~~September,~~ October 1994

William A. Harrison

HONORABLE WILLIAM A HARRISON
Administrative Appeals Judge

FOREST PRACTICES APPEALS BOARD

NORMAN L WINN, Member

DR MARTIN R KAATZ, Member

ROBERT E. QUOIDBACH, Member

F94-20F